

1 Stuart M. Richter (SBN 126231)
stuart.richter@kattenlaw.com
2 Andrew J. Demko (SBN 247320)
andrew.demko@kattenlaw.com
3 **KATTEN MUCHIN ROSENMAN LLP**
2029 Century Park East, Suite 2600
4 Los Angeles, CA 90067-3012
Telephone: 310.788.4400
5 Facsimile: 310.788.4471

6 Rebecca K. Lindahl (*pro hac vice*)
rebecca.lindahl@kattenlaw.com
7 **KATTEN MUCHIN ROSENMAN LLP**
550 South Tryon Street, Suite 2900
8 Charlotte, NC 29202-4213
Telephone: 704.344.3141
9 Facsimile: 704.344.2277

10 Attorneys for Defendant Cree, Inc.

11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15
16 JEFF YOUNG, individually and on
behalf of all others similarly situated,

17 Plaintiff,

18 v.

19 CREE, Inc.,

20 Defendant.

Case No. 4:17-cv-06252-YGR

Hon. Yvonne Gonzalez Rogers

**NOTICE OF MOTION AND
MOTION TO DISMISS
COMPLAINT PURSUANT TO
FED. R. CIV. P. 12(b)(6) AND 9(b)**

[Proposed Order and Request for
Judicial Notice Filed Concurrently]

Complaint Filed: October 27, 2017

Date: February 20, 2018

Time: 2:00 pm

Place: Courtroom 1 – 4th Floor

TO PLAINTIFF AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 20, 2018, at 2:00 pm, or as soon thereafter as the matter may be heard in the courtroom of the Honorable Yvonne Gonzalez Rogers, United States District Court for the Northern District of California, Courtroom 1, 1301 Clay Street, Oakland, California 94612, Defendant Cree, Inc. will and hereby does move the Court for an order dismissing Plaintiff Jeff Young's Complaint and each claim alleged therein.

This motion is made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that Plaintiff's Complaint fails to state claim upon which relief can be granted. Plaintiff has also failed to meet the pleading requirements of Rules 8 and 9.

The motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, the Court records and files in this action, and on such other argument and evidence as may be presented to the Court at or prior to the hearing on this Motion.

Dated: January 9, 2018

KATTEN MUCHIN ROSENMAN LLP

By: /s/ Stuart M. Richter
 Stuart M. Richter
 Attorneys for Defendant Cree, Inc.

Katten

Katten Muchin Rosenman LLP
 2029 Century Park East, Suite 2600
 Los Angeles, CA 90067-3012
 310.788.4400 tel 310.788.4471 fax

TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3	I. INTRODUCTION	1
4	II. STATEMENT OF THE ISSUES TO BE DECIDED.....	2
5	III. STATEMENT OF THE RELEVANT FACTS	3
6	A. The Parties	3
7	B. The Complaint.....	3
8	IV. ARGUMENT AND PERTINENT AUTHORITIES	5
9	A. All of Plaintiff’s Claims Are Preempted by the EPCA	5
10	B. Plaintiff’s Claims Sound in Fraud, Are Subject to Rule	
11	9(b)’s Particularity Requirements, and Fail to Meet Those	
12	Pleading Standards	9
13	C. Each Of Plaintiff’s Claims Should Be Dismissed For	
14	Various Additional Reasons.	10
15	1. Plaintiff’s Labeling Claims Based On Statements	
16	Outside the EnergyGuide Label Should Be	
17	Dismissed Because They Are Really Disguised	
18	Warranty Claims.....	11
19	2. Plaintiff’s Unjust Enrichment Claim Fails Because	
20	It Is Not A Cognizable Claim Under California	
21	Law.....	12
22	3. Plaintiff’s “Negligence—Failure to Test” Claim Is	
23	Preempted, Not A Cognizable Claim Under	
24	California Law, and Is Barred by the Economic	
25	Loss Rule.....	12
26	4. Plaintiff’s Negligent Misrepresentation Claim Is	
27	Barred by the Economic Loss Rule and Is	
28	Insufficiently Alleged	13
	5. Plaintiff’s Claim for Breach of the Covenant of	
	Good Faith and Fair Dealing Fails for Lack of	
	Privity	14
	6. Plaintiff’s Express Warranty Claim Fails Because	
	He Did Not Plead The Warranty Terms And	
	Compliance With Them.	15
	7. Plaintiff’s “Implied Warranties” Claim Fails for	
	Lack of Privity.....	15
	D. Plaintiff’s Fraud and Omission Claims Fail Because Cree	
	Had No Knowledge of Falsity or Alleged Defect	16

Katten

Katten Muchin Rosenman LLP

2029 Century Park East, Suite 2600
Los Angeles, CA 90067-3012
310.788.4400 tel 310.788.4471 fax

1	E.	Plaintiff’s Consumer Protection Claims Based on	
2		Products He Did Not Purchase and Representations He	
		Did Not View Should Be Dismissed.....	18
3	F.	Plaintiff’s Punitive Damages Requests Are Improper.....	18
4	V.	CONCLUSION.....	19
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Anthony v. Yahoo, Inc.</i> , 421 F. Supp. 2d 1257 (N.D. Cal. 2006)	5
<i>Anunziato v. eMachines, Inc.</i> , 402 F. Supp. 2d 1133 (C.D. Cal. 2005).....	16
<i>Apodaca v. Whirlpool Corp.</i> , No. 12-00725, 2013 WL 6477821 (C.D. Cal. Nov. 8, 2013).....	15
<i>Baba v. Hewlett-Packard Co.</i> , No. 09-5946, 2011 WL 317650 (N.D. Cal. Jan. 28, 2011).....	2
<i>Baker v. Bayer Healthcare Pharmaceuticals, Inc.</i> , No. C13-0490-TEH, 2013 WL 6698653 (N.D. Cal. Dec. 19, 2013)	13
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	5
<i>Burr v. Sherwin Williams Co.</i> , 42 Cal.2d 682 (1954).....	14, 15, 16
<i>English v. General Electric Co.</i> , 496 U.S. 72 (1990)	6
<i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861 (2000)	6
<i>Hoey v. Sony Elecs. Inc.</i> , 515 F. Supp. 2d 1099 (N.D. Cal. 2007)	11
<i>In re iPhone 4S Consumer Litig.</i> , No. C 12-1127 CW, 2013 WL 3829653 (N.D. Cal. July 23, 2013)	15
<i>Jurgensen v. Felix Storch, Inc.</i> , No. 12-1201, 2012 WL 2354247 (S.D.N.Y. June 14, 2012)	8
<i>Kanfer v. Pharmacare U.S., Inc.</i> , 142 F. Supp. 3d 1091 (S.D. Cal. 2015)	19

1	<i>Kearns v. Ford Motor Co.</i> ,	
2	567 F.3d 1120 (9th Cir. 2009).....	9, 10, 16
3	<i>Kumar v. Salov North America Corp.</i> ,	
4	No. 14-CV-2411-YGR, 2015 WL 457692 (N.D. Cal. Feb. 3, 2015).....	14, 15
5	<i>Laux v. Mentor Worldwide</i> ,	
6	No. 2:16-CV-01026, 2017 WL 5186329 (C.D. Cal. Nov. 8, 2017).....	15
7	<i>Martin v. Tradewinds Beverage Co.</i> ,	
8	No. 16-9249, 2017 WL 1712533 (C.D. Cal. April 27, 2017)	19
9	<i>Mlejnecky v. Olympus Imaging America, Inc.</i> ,	
10	No. 2:10-CV-02630-JAM-KJN, 2011 WL 1497096 (E.D. Cal. April 19, 2011)	18
11	<i>Opperman v. Path, Inc.</i> ,	
12	87 F. Supp. 3d 1018 (N.D. Cal. 2014).....	10, 14
13	<i>Phillippi v. Stryker Corp.</i> ,	
14	No. 2:09-CV-02445-JAM, 2010 WL 2650596 (E.D. Cal. July 1, 2010) <i>aff'd</i> , 471 F. App'x 663 (9th Cir. 2012).....	13
15	<i>Pirozzi v. Apple, Inc.</i> ,	
16	913 F. Supp. 2d 840 (N.D. Cal. 2012).....	10
17	<i>Punian v. Gillette Co.</i> ,	
18	No. 14-5028, 2016 WL 1029607 (N.D. Cal. Mar. 15, 2016).....	2, 9, 11
19	<i>Red v. The Kroger Co.</i> ,	
20	No. 2:10-CV-01025, 2010 WL 4262037 (C.D. Cal. Sept. 2, 2010)	12
21	<i>Sater v. Chrysler Group, LLC</i> ,	
22	No. 14-00700-VAP, 2015 WL 736273 (C.D. Cal. Feb. 20, 2015)	13
23	<i>Schwartz v. Vizio, Inc.</i> ,	
24	No. 16-1883, 2017 WL 2335364 (C.D. Cal. May 23, 2017)	1, 8, 9
25	<i>Valentine v. Baxter Healthcare Corp.</i> ,	
26	68 Cal. App. 4th 1467 (Cal. App. 1999)	13
27	<i>Williams v. Yamaha Motor Co. Ltd.</i> ,	
28	No. 13-05066-BRO, 2014 WL 12597039 (C.D. Cal. Aug. 19, 2014).....	12, 13

1	<i>Wilson v. Hewlett-Packard Co.</i> ,	
2	668 F.3d 1136 (9th Cir. 2012)	2, 16, 17, 18

3 Statutes

4	42 U.S.C. §§ 6291-6309	6
5	42 U.S.C. § 6297.....	<i>passim</i>
6	42 U.S.C. § 6297(a)(1)(A)	12
7	42 U.S.C. § 6297(g)	6
8	Cal. Bus. and Prof. Code § 17200	<i>passim</i>
9	Cal. Civ. Proc. Code § 1750	<i>passim</i>
10	Cal. Civ. Proc. Code § 1791.2(b)	11
11	Cal. Civ. Proc. Code § 3294(b)	19

13 Rules

14	Fed. R. Civ. Proc. 9(b)	<i>passim</i>
15	Fed. R. Civ. Proc. 12.....	5
16	Fed. R. Civ. Proc. 12(b)(6)	5, 8

18 Regulations

19	16 C.F.R. § 305.2(w)	7
20	16 C.F.R. § 305.3(q)	4, 6
21	16 C.F.R. § 305.15	4, 6

23 Other Authorities

24	S. Rep. No. 94-516, at 517 (1975), reprinted in 1975 U.S.C.C.A.N.	
25	1956	6

I. INTRODUCTION

Defendant Cree, Inc. manufactures light-emitting-diode (“LED”) light bulbs. The packaging for these light bulbs states how long they are designed to last. Plaintiff, who claims three bulbs he purchased “burned out” “[w]ithin months” (Compl. ¶ 32.), is attempting to transform what amounts to a simple, individual (and unjustified) claim for breach of warranty into a massively overbroad class action.

All of Plaintiff’s claims are derived from representations regarding product performance standards subject to the Energy Policy and Conservation Act (“EPCA”), which mandates what must be placed on Cree product labels, including information regarding product life and energy savings. California courts have consistently held that claims based on these kinds of statements—that a plaintiff paid a premium based on the supposed energy savings over the expected life of a product—are preempted. *See, e.g., Schwartz v. Vizio, Inc.*, No. 16-1883, 2017 WL 2335364, at *4 (C.D. Cal. May 23, 2017) (“[S]ection 6297(g) expressly preempts all of Plaintiff’s claims—to the extent that they rely on the EnergyGuide label—because all of those claims allege that the televisions did not perform as promised on a federally-required label.”). Like the plaintiff in *Vizio*, Plaintiff here alleges he paid a premium for Cree’s LED bulbs based on information required by the EPCA. Those claims, no matter how characterized (breach of warranty, violation of the UCL, etc.), are preempted as a matter of law.

Plaintiff’s misrepresentation claims also fail because he has not met the requirements of Rule 9(b), including what representations he relied on and when he saw them. Moreover, Cree never promised that every bulb it manufactured would last the full time indicated on the product label. That Plaintiff’s bulbs did not last the number of hours that other Cree bulbs did in government testing does not make those representations false or misleading;

rather, at best, they may constitute an individual warranty claim. *See, e.g., Punian v. Gillette Co.*, No. 14-5028, 2016 WL 1029607 at *6 (N.D. Cal. Mar. 15, 2016). However, here there are no factual allegations that Cree failed to send Plaintiff replacement bulbs or his money back after he “returned the product to Cree, Inc.” within ten years of purchase. Accordingly, there has been no breach of warranty and one certainly has not been alleged.

Plaintiff’s claims suffer from additional deficiencies that compel dismissal. For example, his claims for unjust enrichment and “negligence—failure to test” are not recognized causes of action in California. In addition, Plaintiff’s negligence-based claims are barred by the economic loss rule because Plaintiff alleges only damage to the product he purchased. Plaintiff’s claims for breach of implied warranties and breach of the covenant of good faith and fair dealing also fail because there is no privity between Plaintiff and Cree; he bought his bulbs at Wal-Mart. To the extent Plaintiff’s claims can be characterized as being based on “omissions” instead of “misrepresentations,” they still fail because Cree had no duty to disclose unless it knew of a defect that, as here, arose during the warranty period. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141-42 (9th Cir. 2012). Plaintiff has not made and cannot make these allegations; reference to six anonymous, unverified online complaints “does not establish knowledge of an alleged defect.” *Baba v. Hewlett-Packard Co.*, No. 09-5946, 2011 WL 317650 at *3 (N.D. Cal. Jan. 28, 2011).

Plaintiff cannot correct these defects by amendment. Accordingly, his Complaint should be dismissed without leave to amend.

II. STATEMENT OF THE ISSUES TO BE DECIDED

1. Do Plaintiff’s claims fail because each is preempted under the EPCA?

2. Do Plaintiff’s claims sound in fraud such that each is subject to

1 Rule 9(b)'s particularity requirements and does each claim fail to meet that
2 standard?

3 3. Should Plaintiff's claims for unjust enrichment and "negligence—
4 failure to test" be dismissed because neither cause of action is cognizable
5 under California law?

6 4. Should Plaintiff's claims for negligent misrepresentation and
7 "negligence—failure to test" be dismissed as barred by the economic loss rule?

8 5. Should Plaintiff's contractual and implied warranty claims be
9 dismissed because there is no privity between the parties?

10 6. Should Plaintiff's fraud and consumer protection claims be
11 dismissed because Plaintiff has failed to plead that Cree knew of the alleged
12 defect?

13 7. Are Plaintiff's requests for punitive damages inappropriate?

14 **III. STATEMENT OF THE RELEVANT FACTS**

15 **A. The Parties**

16 Cree, a North Carolina corporation, manufactures lighting products and
17 numerous types of LED bulbs that Cree sells to consumers through various
18 retailers and distributors.

19 Plaintiff Jeff Young is a resident of Guerneville, California, and
20 allegedly purchased Cree products from Wal-Mart, a third-party retailer.
21 (Compl. ¶ 32.)

22 **B. The Complaint**

23 Plaintiff filed this putative class action on October 27, 2017, alleging
24 claims for violation of the UCL, FAL, and CLRA; breach of the covenant of
25 good faith and fair dealing; fraudulent misrepresentation and concealment;
26 negligent misrepresentation; unjust enrichment; breach of express and implied
27 warranties; and "negligence—failure to test." With the exception of Young's
28 final negligence claim, all of these claims are based on the federally-mandated

1 contents of Cree’s product labels, the requirements of which are set forth in the
2 Energy Policy Conservation Act, 42 U.S.C. § 6297 (“EPCA”) and regulations
3 promulgated thereunder. Specifically, 16 C.F.R. § 305.3(q) includes LED
4 lamps as “covered products” under Energy Star and related federal regulations,
5 while 16 C.F.R. § 305.15 requires LED bulb manufacturers like Cree to
6 include the light output, estimated annual energy cost, and projected lifespan
7 of the product on its label.

8 Plaintiff’s Complaint alleges that he purchased three Cree 100-Watt
9 Standard A-Type bulbs (the “Bulbs”) from Wal-Mart “on or around April of
10 2015.” (Compl. ¶ 32.) Plaintiff alleges he paid between \$15 and \$20 per Bulb
11 and that each “burned out” “[w]ithin months.” (*Id.*) These are the only
12 allegations in the Complaint regarding Plaintiff and his purchase of the bulbs.

13 The bulk of the Complaint’s allegations consist of the statements on
14 Cree’s product labeling and packaging for several of its product models,
15 including products Plaintiff does not claim to have purchased. For example,
16 Plaintiff alleges that Cree manufactures six LED lamps as replacements for
17 traditional incandescent bulbs, called A-Type lamps: 40-watt, 60-watt,
18 connected 60-watt, 75-watt, 100-watt, and 3-way replacement. (Compl. ¶ 18.)
19 Plaintiff also references a “Cree Reflector (Flood/Spot)” light and associated
20 lifespan. (Compl. ¶¶ 22, 23.) Depending on the type of lamp, Cree’s
21 packaging provides a projected lifetime of up to 27 years. (Compl. ¶ 16.) The
22 packaging for the type of lamp Young alleges he purchased states a lifetime of
23 13 years or 15,000 hours. (Compl. ¶ 17 n.1.)

24 In addition to allegations regarding the lifespans of Cree’s bulbs, the
25 Complaint focuses on other statements, such as the energy-cost savings
26 estimates on Cree’s packaging for consumers who replace an incandescent
27 bulb with an LED bulb. (Compl. ¶¶ 25, 27, 28.) Plaintiff also points to Cree’s
28 “100% Satisfaction Guarantee” and the existence of Cree’s warranty. (Compl.

¶ 27.) Plaintiff alleges that all of these statements, including the lifespan of Cree’s LED bulbs, estimated energy-cost savings, Cree’s satisfaction guarantee, and Cree’s 10-year warranty, are false and misleading. (Compl. ¶¶ 27-29.)

In support of these allegations, Plaintiff includes six online customer complaints sampled from various websites over an unspecified period of time. (Compl. ¶ 31.) Plaintiff provides the source for only five of the six customer complaints. (*Id.*) Of those five, none are dated and each appears to have been posted to third-party sites and not to Cree’s website. (*Id.*) Each comment states only that unspecified lamps failed sooner than expected. (*Id.*)

IV. ARGUMENT AND PERTINENT AUTHORITIES

While a complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion, the plaintiff must still provide the grounds of his entitlement to relief. *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That obligation “requires more than labels and conclusions.” *Twombly*, 550 U.S. at 555. Thus, a complaint requires dismissal if it “exhibits either a ‘lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.’” *Anthony v. Yahoo, Inc.*, 421 F. Supp. 2d 1257, 1260 (N.D. Cal. 2006) (citation omitted).

For the reasons set forth below, Plaintiff has failed to satisfy the Rule 12 pleading standards for any of his claims.

A. All of Plaintiff’s Claims Are Preempted by the EPCA

Federal law may preempt state law claims in three ways: express preemption by statute, occupying the field, or when there is a conflict between federal and state regulation. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). As explained next, Congress expressly preempted any state laws or regulations that conflict with the disclosure requirements imposed by the EPCA and stated that compliance with the statute’s labeling requirement

1 cannot create potential state-law based liability. Plaintiff's state law claims all
2 derive from supposed misrepresentations included on Cree's federally-
3 mandated EnergyGuide Label. As a result, Plaintiff's claims are preempted
4 because they are premised on a state law duty that conflicts with federal law.
5 *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000).

6 Under the EPCA, Congress established a comprehensive national energy
7 conservation program to reduce energy use in the United States. *See* S. Rep.
8 No. 94-516, at 517 (1975), reprinted in 1975 U.S.C.C.A.N. 1956, 1957. It
9 created a statutory framework for energy efficiency testing and labeling of
10 consumer home products, including LED light bulbs, and authorized the
11 creation of energy efficiency requirements. 42 U.S.C. §§ 6291-6309.
12 Critically here, the EPCA provides that where a manufacturer is required by
13 federal law to set out representations about a product's performance on a label,
14 those representations cannot create an express or implied warranty. 42 U.S.C.
15 § 6297(g) ("Any disclosure with respect to energy use, energy efficiency, or
16 estimated annual operating cost . . . shall not create an express or implied
17 warranty under State or Federal law.")).

18 Federal regulations promulgated under the EPCA require LED bulb
19 manufacturers, like Cree, to provide the information at the heart of each of
20 Plaintiff's claims. Specifically, 16 C.F.R. § 305.3(q) includes LED lamps as
21 "covered products", and 16 C.F.R. § 305.15 requires LED bulb manufacturers
22 like Cree to include the light output, estimated annual energy cost ("in dollars
23 based on usage of 3 hours per day and 11 cents (\$0.11) per kWh"), and
24 lifespan of the product on its label. The lifespan of an LED bulb, based on "3
25 hours operation per day," is defined as the "length of operating time of a
26 statistically large group of lamps between first use and failure of 50 percent of
27 the group." 16 C.F.R. § 305.2(w).

28 All of Plaintiff's claims hinge on the allegation that his Cree Bulbs did

not last as long as the “lifespan” Cree cited on the bulb’s label (thereby not delivering the anticipated energy savings). *See* Compl. ¶ 17 (listing the supposed misrepresentations based on lifespan and energy savings), ¶ 46 (UCL claim premised on supposed misrepresentations about “reliability, durability, longevity” and/or “omitting the material facts about the actual lifespan of the LED Lightbulbs”); ¶ 59 (FAL claim based on the same allegations); ¶ 67 (CLRA claim based on the same allegations); ¶ 81 (breach of the covenant of good faith and fair dealing based on the same alleged representations and failing to “disclose material facts regarding the true qualities and lifespan of the LED Lightbulbs”); ¶ 89 (fraud claim based on the same allegations); ¶ 95 (negligent misrepresentations based on the same allegations); ¶ 104 (unjust enrichment based on the “conduct challenged in the Complaint”); ¶ 121 (breach of warranty premised on the “Product” not “containing the properties Defendants represented”); ¶ 128 (failure to test longevity and quality of the LED Lightbulbs).¹ All of these claims are covered by the requirements set forth in the EPCA and its regulations.

Because Plaintiff’s claims allege that Cree bulbs did not perform as promised based on statements derived from a federally-required label, that Cree should have disclosed something additional to what was required on the label, or that Cree should have tested the products differently than required under the EPCA, the statute completely preempts each of his claims.

This is true both for Plaintiff’s warranty and non-warranty claims. In *Schwartz v. Vizio, Inc.*, the plaintiff brought a putative class action alleging

¹ One need only look at Plaintiff’s list of “common questions of fact” to determine that his claims all derive from the EnergyGuide Label as they all entail questions about the bulbs’ durability, life span, and energy savings. *See, e.g.*, Compl. ¶36(b) (“Whether Defendant . . . sold LED lights . . . which do not last as long as their represented . . . life span and do not provide the promised cost savings.”).

misrepresentations by a television manufacturer about a product’s energy consumption. No. 16-1883, 2017 WL 2335364 at *1 (C.D. Cal. May 23, 2017). The *Vizio* plaintiffs alleged that the manufacturer made misrepresentations on product labeling required by the Federal Trade Commission, and brought nine claims for breach of various consumer protection statutes, breach of warranties, negligent and intentional misrepresentation, fraud, and unjust enrichment. *Id.* In response, *Vizio* moved to dismiss under Rule 12(b)(6), arguing that the EPCA preempted all of the plaintiffs’ claims that relied on the label representations. *Id.* at *2. The District Court for the Central District of California agreed, holding that “each of Plaintiffs’ seven non-warranty claims require wrongful underlying conduct . . . [and] allege that *Vizio* misrepresented [a feature of their product]. These claims are simply attempts to backdoor in a breach of warranty claim.” *Id.* at *4. Accordingly, the *Vizio* Court held that all of Plaintiff’s label-misrepresentation-based claims were preempted by the EPCA and dismissed the complaint because “all of those claims allege that the televisions did not perform as promised on a federally-required label.” *Id.*

The *Vizio* Court was not alone in finding that a plaintiff’s consumer protection claims were an improper attempt to allege a breach of warranty. Other courts have held that the EPCA preemption analysis looks to the “gravamen” of the claim, not how it is styled by the plaintiff. *See also Jurgensen v. Felix Storch, Inc.*, No. 12-1201, 2012 WL 2354247, at *6-7 (S.D.N.Y. June 14, 2012) (describing the plaintiff’s “unjust enrichment” claim as a “backdoor breach of warranty claim”; in other words, “simply a reiteration” of the breach of warranty claim “under a different name.”); *see also Punian v. Gillette Co.*, No. 14-5028, 2016 WL 1029607 at *6 (N.D. Cal. Mar. 15, 2016) (finding representations about a battery’s propensity to leak within 10 years a warranty and not an actionable misrepresentation). Here, as

1 in *Vizio*, all of Plaintiff’s claims rely on representations on the federally-
 2 required label and all allege “wrongful conduct” that, at base, constitutes a
 3 breach of warranty claim. Thus, because Plaintiff’s state-law claims are all
 4 based on or inextricably intertwined with information on the bulb’s federally
 5 required label, each is preempted. For the same reason, amendment of each
 6 claim would be futile. Accordingly, the Court should dismiss all of Plaintiff’s
 7 claims as preempted by the EPCA.

8 **B. Plaintiff’s Claims Sound in Fraud, Are Subject to Rule 9(b)’s**
 9 **Particularity Requirements, and Fail to Meet Those Pleading**
 10 **Standards**

11 However denominated, each of Plaintiff’s claims is based upon alleged
 12 misrepresentations and thus “sounds in fraud.” *Kearns v. Ford Motor Co.*, 567
 13 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) of the Federal Rules of Civil
 14 Procedure, which provides that plaintiffs must plead fraud with particularity,
 15 applies equally to claims that are not nominally fraud claims but “sound in
 16 fraud.” *Id.*

17 In *Kearns*, the plaintiff alleged that the defendant violated the CLRA and
 18 UCL by misrepresenting that its certified pre-owned vehicles were inspected
 19 by “specially trained technicians” and that those inspections were “more
 20 rigorous and therefore more safe.” *Id.* at 1125. The *Kearns* plaintiff alleged
 21 he was exposed to those representations through national advertising,
 22 dealership sales material, and dealership personnel. *Id.* at 1125-26. In
 23 upholding the trial court’s order dismissing the plaintiff’s claims under Rule
 24 9(b), the Ninth Circuit held that the plaintiff’s claims were subject to Rule
 25 9(b)’s particularity requirements because they depended upon allegations of
 26 fraudulent conduct. *Id.* at 1125. The Ninth Circuit concluded that because the
 27 *Kearns* plaintiff failed to allege “the particular circumstances surrounding such
 28 representations,” including “when he was exposed to them,” “which ones he

1 found material,” and “which sales material he relied upon in making his
2 decision to buy,” his claims did not satisfy Rule 9(b)’s particularity
3 requirements. *Id.* at 1126.

4 Here, like in *Kearns*, Plaintiff’s allegations do not pass muster under
5 Rule 9(b). Though Plaintiff describes specific representations from Cree’s
6 labels and website at some length, he fails to allege: (i) when, or even whether,
7 he saw or was otherwise exposed to the representations (*i.e.*, when he visited
8 Cree’s website); (ii) whether he found any of the representations to be
9 material; and (iii) which, if any, of the representations he relied upon when
10 purchasing the bulbs. (*See Compl.*)² Because Plaintiff did not set out the
11 specific factual circumstances surrounding his allegations of fraudulent
12 conduct, this Court should dismiss his claims under Rule 9(b). *See Kearns*,
13 567 F.3d at 1126-27; *see also Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018,
14 1047-48 (N.D. Cal. 2014); *Pirozzi v. Apple, Inc.*, 913 F. Supp. 2d 840, 850
15 (N.D. Cal. 2012) (dismissing claims for negligent misrepresentation and
16 violations of the UCL, CAL, and CLRA because plaintiff “fail[ed] to provide
17 the particulars of her own experience reviewing or relying upon” the
18 defendant’s allegedly false representations).

19 **C. Each Of Plaintiff’s Claims Should Be Dismissed For Various**
20 **Additional Reasons.**

21 As mentioned above, even if Plaintiff’s claims did not fail because of
22 either their preemption by the EPCA or Plaintiff’s insufficient allegations
23 under Rule 9(b), then each claim also fails for the reasons addressed below.

24
25
26
27
28 ² Proposition 64 requires Plaintiff to plead his individual reliance for fraud
based UCL claims. The FAL and CLRA also have reliance requirements.

1. Plaintiff’s Labeling Claims Based On Statements Outside the EnergyGuide Label Should Be Dismissed Because They Are Really Disguised Warranty Claims.

The supposed misrepresentations that are not based on the EnergyGuide Label (all of which are preempted) are disguised warranty claims that would not deceive a reasonable consumer. *See Punian*, 2016 WL 1029607, at *6-8. Specifically, Plaintiff cites to the 10-year warranty and the 100% Satisfaction Guarantee on the products’ labels. (Compl. ¶ 27.) As the Court in *Punian* explained, the word “Guarantee,” and certainly the word “Warranty,” generally create an express warranty. 2012 WL 1029607 at *6; *see also* CAL. CIV. CODE § 1791.2(b) (“It is not necessary to the creation of an express warranty that formal words such as ‘warrant’ or ‘guarantee’ be used, but if such words are used then an express warranty is created.”).

Using these words is thus not a promise that each individual bulb will last for the limited warranty period or the lifespan stated on the products’ label. *Punian*, 2016 WL 1029607 at *6-7 (“A reasonable person would understand the Duralock guarantee as a promise to repaid, replace, or refund a battery that is in storage and fails within ten years of purchase—not a promise that Duralock Batteries have no potential to leak.”); *Hoey v. Sony Elecs. Inc.*, 515 F. Supp. 2d 1099, 1104 (N.D. Cal. 2007) (“Plaintiffs seek to bootstrap Sony’s express warranty into a representation that the VAIO notebooks are defect-free Nothing in the warranty expressly or impliedly warrants that the computer will be defect free either during the warranty period or thereafter.”).

Accordingly, here, that one or more of Plaintiff’s Bulbs did not last ten or more years or that he was not 100% satisfied does not mean Cree’s statements on the labels were misleading. *Punian*, 2016 WL 1029607 at *8 (“Accordingly, the potential of Duralock Batteries to leak in storage,

1 regardless of how storage is defined, does not determine whether the Duralock
2 guarantee is likely to mislead reasonable consumers.”). As a result, Plaintiff’s
3 causes of action based on these representations (except for a breach of express
4 warranty, which fails for other reasons, *see infra* at 15) should be dismissed
5 without leave to amend.

6 **2. Plaintiff’s Unjust Enrichment Claim Fails Because It Is**
7 **Not A Cognizable Claim Under California Law**

8 Plaintiff’s seventh claim for unjust enrichment should be dismissed
9 because “unjust enrichment” is not a cause of action in California. *Williams v.*
10 *Yamaha Motor Co. Ltd.*, No. 13-05066-BRO, 2014 WL 12597039 at *16 (C.D.
11 Cal. Aug. 19, 2014) (dismissing plaintiffs’ unjust enrichment claim with
12 prejudice because “California does not recognize unjust enrichment as an
13 independent cause of action.”).

14 **3. Plaintiff’s “Negligence—Failure to Test” Claim Is**
15 **Preempted, Not A Cognizable Claim Under California**
16 **Law, and Is Barred by the Economic Loss Rule.**

17 Plaintiff’s negligent failure to test claim is preempted. The EPCA has
18 testing requirements for the supposed misrepresentations made on the LED
19 bulbs’ labels. Accordingly, any claim premised on a supposed lack of testing
20 to come up with these supposed misrepresentations is preempted. 42 U.S.C.
21 § 6297(a)(1)(A) (“[T]his part supersedes any State regulation insofar as such
22 State regulation provides at any time for the disclosure of information with
23 respect to any measure of energy consumption . . . of any covered product if
24 such State regulation requires testing or the use of any measure of energy
25 consumer . . . other than that provided under section 6293 of this title.”). *See*
26 *Red v. The Kroger Co.*, No. 2:10-CV-01025, 2010 WL 4262037 at *7 (C.D.
27 Cal. Sept. 2, 2010) (holding that state law claims can be “State regulations”
28 that impose “requirements” such that they are preempted by federal law).

This claim also should be dismissed because it is not a cause of action in California. *Baker v. Bayer Healthcare Pharmaceuticals, Inc.*, No. C13-0490-TEH, 2013 WL 6698653 at *3 (N.D. Cal. Dec. 19, 2013). California imposes no liability for breach of an independent duty to conduct testing, particularly “where the causal link to the known harm to plaintiff is the *unknown outcome of testing that was not done*,” as such an imposition “would be beyond the pale of any California tort doctrine we can identify.” *Valentine v. Baxter Healthcare Corp.*, 68 Cal. App. 4th 1467, 1486 (Cal. App. 1999) (emphasis in original). *See also Phillippi v. Stryker Corp.*, No. 2:09-CV-02445-JAM, 2010 WL 2650596 at *2 (E.D. Cal. July 1, 2010) *aff’d*, 471 F. App’x 663 (9th Cir. 2012).

And even if Plaintiff’s claim for “negligence—failure to test” were a cognizable claim in California, it would still be barred by the economic loss rule. The economic loss rule “bars tort claims that seek to recover only economic losses, that is, damage to a defective good caused by the defect.” *Sater v. Chrysler Group, LLC*, No. 14-00700-VAP, 2015 WL 736273 at *13 (C.D. Cal. Feb. 20, 2015). Where, as here, a plaintiff alleges only damage to the product itself in a negligence-based claim, that claim is barred by the economic loss rule. *Williams v. Yamaha*, No. 13-5066, 2014 WL 12597039 at *17 (C.D. Cal. Aug. 19, 2014) (dismissing with prejudice plaintiffs’ claim for negligent failure to test under the economic loss rule) (collecting cases).

4. Plaintiff’s Negligent Misrepresentation Claim Is Barred by the Economic Loss Rule and Is Insufficiently Alleged

Plaintiff’s claim for negligent misrepresentation is also barred under the economic loss rule for the same reasons as his claim for “negligence—failure to test.” *See Williams v. Yamaha*, 2014 WL 12597039 at *17 (dismissing with prejudice plaintiffs’ claim for negligent misrepresentation under the economic loss rule) (collecting cases).

The negligent misrepresentation claim also should be dismissed for failure to plead the required elements. Plaintiff makes a conclusory statement that he “reasonably relied upon Defendant’s misstatements to [his] detriment.” (Compl. ¶ 96.) As discussed above, however, Plaintiff fails to state which alleged misrepresentations he relied upon in purchasing his Bulbs, and therefore has failed to plead detrimental reliance, which is fatal to his claim for negligent misrepresentation. *See Opperman v. Path, Inc.*, 87 F. Supp. 3d at 1045-46 (“And for negligent misrepresentation claims, a plaintiff must establish detrimental reliance. . . [W]ithout such reliance, there is no recovery.”).

5. Plaintiff’s Claim for Breach of the Covenant of Good Faith and Fair Dealing Fails for Lack of Privity

Plaintiff admits that he did not buy any bulbs directly from, and thus is not in privity with, Cree. Breach of contract claims, including a claim for breach of the covenant of good faith and fair dealing, require “privity between the parties [as] a necessary element.” *Kumar v. Salov North America Corp.*, No. 14-CV-2411-YGR, 2015 WL 457692 at *1 (N.D. Cal. Feb. 3, 2015). Generally, “there is no privity between a seller and subsequent purchaser who is in no way a party to the original sale.” *Id.* (citing *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 695 (1954)). In *Kumar*, the plaintiff brought causes of action for breach of contract and breach of the covenant of good faith and fair dealing based on label representations on bottles of olive oil she bought at a grocery store. *Kumar*, 2015 WL 457692 at *2, *6. The District Court dismissed the plaintiff’s claims for lack of privity without leave to amend because she failed to allege the existence of a contract and cited “to no case endorsing the view that statements on a product label could constitute a contract.” *Id.* at *6.

Here, Plaintiff alleges he purchased his bulbs from Wal-Mart. (Compl. ¶

32.) Plaintiff’s purchase of bulbs through a third party cannot create a contract between Plaintiff and Cree. *See id.*; *see also Burr*, 42 Cal. 2d at 695. As in *Kumar*, Plaintiff has not, and cannot, allege the existence of a contract between Plaintiff and Cree “based on product label representations” or any other basis on the facts alleged. *Kumar*, 2015 WL 457692 at *6. Accordingly, Plaintiff’s claim for breach of the covenant of good faith and fair dealing should be dismissed with prejudice.

6. Plaintiff’s Express Warranty Claim Fails Because He Did Not Plead The Warranty Terms And Compliance With Them.

Plaintiff’s warranty claims—other than those concerning the EnergyGuide Label—fail because they are insufficiently alleged. *In re iPhone 4S Consumer Litig.*, No. C 12-1127 CW, 2013 WL 3829653 at *15 (N.D. Cal. July 23, 2013) (requiring a plaintiff to plead the exact terms of an express warranty). Plaintiff does not allege that he ever attempted to return the bulbs under Cree’s five-year or ten-year warranties. (*See* Compl. ¶ 16 (showing one product with a five-year limited warranty and two products with ten-year warranties); *see also* RJN, Exhs. 1 through 3.) Nor does Plaintiff allege that he complied with the terms of Cree’s warranty or that Cree failed to replace his bulbs or refund Plaintiff’s money under its warranty, as required to bring a breach of warranty claim. *See Laux v. Mentor Worldwide*, No. 2:16-CV-01026, 2017 WL 5186329 at *5 (C.D. Cal. Nov. 8, 2017). Accordingly, no breach of these warranties has been alleged. *See Apodaca v. Whirlpool Corp.*, No. 12-00725, 2013 WL 6477821 at *10 (C.D. Cal. Nov. 8, 2013).

7. Plaintiff’s “Implied Warranties” Claim Fails for Lack of Privity

Plaintiff’s implied warranty claims should also be dismissed for a lack of privity. *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D.

Cal. 2005) (noting that California requires privity for implied warranty claims). In *Anunziato*, the plaintiff brought a putative class action against a laptop computer manufacturer, alleging that a product defect caused the laptops to overheat. 402 F. Supp. 2d. at 1135-36. The named plaintiff purchased his laptop from BestBuy, a distributor. *Id.* at 1136. The *Anunziato* plaintiff could not thus allege privity with the laptop manufacturer. *Id.* at 1141. The District Court for the Central District of California therefore dismissed the plaintiff’s breach of implied warranty claim. *Id.*

Plaintiff alleges he purchased his bulbs from Wal-Mart, a distributor. (Compl. ¶ 32.) Plaintiff is not therefore in privity with Cree, as required to bring an implied warranty claim against Cree. *Anunziato*, 402 F. Supp. 2d at 1141; *Burr*, 42 Cal. 2d at 695. In addition, Plaintiff fails to allege any facts that support his breach of warranty claims. Thus, Plaintiff’s warranty claims should be dismissed with prejudice.

D. Plaintiff’s Fraud and Omission Claims Fail Because Cree Had No Knowledge of Falsity or Alleged Defect

To survive a motion to dismiss, Plaintiff’s claims for fraud must allege that Cree knew of the alleged falsity of its misrepresentations and knew of the alleged defect in Cree’s bulbs. *See Kearns*, 567 F.3d at 1126. Similarly, Plaintiff must allege that Cree “was aware of [the alleged] defect at the time of sale to survive a motion to dismiss” for UCL and CLRA omission claims.³ *Wilson*, 668 F.3d at 1145. Plaintiff does neither.

His fraud and consumer protection claims hinge entirely on allegations that Cree had access to information about either the bulb’s performance or customer complaints that would alert it to a defect. As a matter of law, these

³ Additionally, these are not proper omission claims because Plaintiff is simply alleging that Cree did not disclose that its federally required representations about lifespan and energy savings were supposedly false. This is just a garden variety misrepresentation claim recast as an omission.

1 allegations do not support Plaintiff's claims. In *Wilson*, the plaintiff brought a
 2 putative class action against Hewlett-Packard, asserting CLRA and UCL
 3 claims and alleging that the manufacturer misrepresented and concealed a
 4 laptop design defect. *Id.* at 1139. In support of his contention that HP was
 5 aware of the laptop defect, the *Wilson* plaintiff alleged that HP had "been on
 6 notice, since the time it began manufacturing and selling the laptops" because
 7 it had "access to the aggregate information and data" on the laptops'
 8 performance. *Id.* at 1146. The plaintiff also included "several customer
 9 complaints" to indicate HP was aware of a defect. *Id.*

10 Rejecting these arguments, the Ninth Circuit held that the plaintiff's
 11 allegations that HP was aware of a defect "seem merely conclusory." *Id.* at
 12 1147. Specifically, the Ninth Circuit rejected plaintiff's "generalized
 13 assertion" that HP was on notice of the defect because it had access to laptop
 14 performance data and had received undated customer complaints. *Id.* at 1148.
 15 The Ninth Circuit specifically noted that "courts have expressed doubt that
 16 customer complaints in and of themselves" show a manufacturer's knowledge
 17 of a defect, *id.* at 1147, and affirmed dismissal. *Id.* at 1148.

18 Here, Plaintiff makes no factual allegations that Cree knew of either the
 19 falsity of its alleged misrepresentations or knew of a defect in the bulbs.
 20 Instead, as in *Wilson*, Plaintiff alleges that Cree had "superior knowledge" of
 21 the bulbs' characteristics. (Compl. ¶¶ 49, 59, 70, 87.) Like in *Wilson*, these
 22 conclusory allegations do not show Cree's knowledge of false
 23 misrepresentations or a bulb defect. *Wilson*, 668 F.3d at 1147.

24 Nor does Plaintiff's inclusion of customer complaints show that Cree
 25 knew of alleged misrepresentations or defects. Plaintiff included five
 26 complete (and one incomplete) customer complaints that are anonymous,
 27 unverified, undated, and posted to third-party sites rather than Cree's own
 28 website. (Compl. ¶ 31.) As a matter of law, these complaints do not support

any inference that Cree was or should have been aware of alleged falsity in its advertising or an alleged defect in its products. *See Wilson*, 668 F.3d at 1147-48. The Court should thus dismiss Plaintiff's fraud and consumer protection claims.

E. Plaintiff's Consumer Protection Claims Based on Products He Did Not Purchase and Representations He Did Not View Should Be Dismissed

Although Plaintiff alleges that he purchased only three "100 Watt Standard A-Type" bulbs (Compl. ¶ 32), the Complaint includes allegations about numerous other products. (Compl. ¶¶ 17, 18, 22, 24.) To the extent Plaintiff's claims are based on products he did not actually purchase, his claims fail. *Mlejnecky v. Olympus Imaging America, Inc.*, No. 2:10-CV-02630-JAM-KJN, 2011 WL 1497096 at *4 (E.D. Cal. April 19, 2011) (dismissing consumer protection claims concerning products plaintiff did not purchase).

Similarly, Plaintiff's Complaint includes alleged misrepresentations regarding the products he did not purchase. (Compl. ¶¶ 17, 20, 21, 23, 25, 26.) As discussed above, it is impossible for Cree to determine which of the representations included in the Complaint Plaintiff may have viewed and relied upon in purchasing his bulbs because he does not plead his claims with sufficient particularity. Regardless, because Plaintiff did not purchase the products these representations concern, logically he did not rely upon these statements. To the extent his claims are based on representations he did not view or rely upon, his claims fail. *Mlejnecky*, 2011 WL 1497096 at *5 (holding plaintiff lacked standing to sue defendant "for advertisements and statements other than those she saw and relied upon").

F. Plaintiff's Punitive Damages Requests Are Improper

Plaintiff requests, but is not entitled to, punitive damages for his CLRA

1 and negligent misrepresentation claims. (Compl. ¶¶ 74, 99.) The Court should
2 reject both requests.

3 First, punitive damages are not recoverable for claims of negligent
4 misrepresentation. *Martin v. Tradewinds Beverage Co.*, No. 16-9249, 2017
5 WL 1712533 at *11 (C.D. Cal. April 27, 2017).

6 With respect to Plaintiff's CLRA claim, his request for punitive damages
7 fails because he did not allege that "an officer, director, or managing agent of
8 the corporation . . . consciously disregarded, authorized, or ratified each act of
9 oppression, fraud, or malice." CAL. CIV. CODE § 3294(b); *Kanfer v.*
10 *Pharmacare U.S., Inc.*, 142 F. Supp. 3d 1091, 1108 (S.D. Cal. 2015). The
11 Court should therefore reject both claims for punitive damages.

12 **V. CONCLUSION**

13 Plaintiff's claims should be dismissed because they: (i) are preempted
14 under the EPCA; (ii) are pleaded with insufficient particularity; (iii) include
15 claims that are not cognizable under California law; (iv) are based on products
16 Plaintiff did not purchase and representations he did not view or rely upon; and
17 (v) include inappropriate claims for punitive damages.

18
19 Dated: January 9, 2018

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP

22 By: /s/ Stuart M. Richter
23 Stuart M. Richter
24 Attorneys for Defendant Cree, Inc.